Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC and Grain Spectrum II, LLC Seek FCC Consent to the Assignment of Advanced Wireless Services and Lower 700 MHz Band B Block Licenses and to Long-Term *De Facto* Transfer Spectrum Leasing Arrangements Involving Advanced Wireless Services and Lower 700 MHz Band B Block Licenses	)))))))))))	WT Docket No. 13-56

REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association ("CCA") hereby submits this reply in support of its petition for conditions in the event that the Commission approves the proposed license assignments and leasing arrangements among AT&T Inc. ("AT&T"), Cellco Partnership d/b/a Verizon Wireless ("Verizon"), and Grain Spectrum, LLC and Grain Spectrum II, LLC ("Grain") (collectively, the "Applicants").[1]

DISCUSSION

I. CCA'S PETITION DEMONSTRATED A TRANSACTION-SPECIFIC HARM THAT SHOULD BE REDRESSED WITH A TRANSACTION-SPECIFIC REMEDY

The Applicants predictably attempt to deflect the serious concerns raised by CCA and others that the proposed transactions would harm the public interest. The essence of the Applicants' opposition is that the competitive harms asserted by the petitioners "are or were the

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[1] *See* Competitive Carriers Association Petition for Conditions, WT Docket No. 13-56 (filed April 4, 2013) ("CCA Petition for Conditions").

subject of industry-wide proceedings," and they claim that the petitioners have "provided no evidence of any harms that would result from these transactions that their proposed conditions would purportedly address."[2] With respect to CCA's petition for conditions, the Applicants are flatly incorrect.

This transaction, if approved without condition, will further entrench the dominant positions of Verizon and AT&T and constrain competitors' access to interoperable devices, all to consumers' detriment. The Antitrust Division of the United States Department of Justice ("Department" or "DoJ")—a federal agency with unparalleled experience enforcing antitrust law and promoting competition—recently opined *within the specific context of spectrum aggregation policy* that the Commission has a variety of avenues to promote competition, including "prohibit[ing] . . . business practices that thwart innovation" and adopting "public policies that affirmatively lower entry barriers facing new entrants and new technologies."[3] DoJ notes that "[t]he ability to exercise market power can take various forms and harm competition in multiple ways," such as insulating a carrier from competitive pressures or diminishing innovation.[4] As part of its determination of whether a wireless transaction may give the parties an ability to exercise market power, the Department considers, among other factors, whether providers are limited by insufficient spectrum or other factors in their ability to add new customers.[5]

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2 Joint Opposition of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC to Petitions to Deny or For Conditions and Reply to Comment, WT Docket No. 13-56, at 5 (filed April 15, 2013) ("Joint Opposition").

3 *Ex Parte* Submission of the United States Department of Justice, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, at 7 (filed April 11, 2013) ("DoJ Ex Parte").

4 *Id*. at 7.

5 *Id*. at 13.

CCA's petition did not simply raise generalized concerns about spectrum aggregation or lack of interoperability in the Lower 700 MHz band arising from AT&T's and Verizon's dominant spectrum positions. Rather, CCA targeted the specific issue of AT&T's aggregation in the Lower 700 MHz B block and the resulting harms to the public interest from AT&T's acquisition of the *B Block licenses at issue in this proceeding*.[6] CCA's petition established that AT&T repeatedly has acted to thwart interoperability in the Lower 700 MHz band, and that its dominance in the Lower 700 MHz B Block in particular has been the cause of interoperability problems.[7] AT&T's efforts to obtain additional B block licenses through these proposed transactions would sharply increase its ability and incentive to impair competition from smaller rivals and to raise those rivals' costs by impeding the availability of interoperable devices and further stranding the Lower 700 MHz A Block. This *increase* in concentration in the Lower 700 MHz B Block—which would bolster AT&T's existing incentive and ability to harm competition in the Lower 700 MHz band—would arise directly from the proposed license assignments at issue in this proceeding, and thus plainly constitutes transaction-specific harm.

Moreover, Applicants' Joint Opposition (implicitly) asks the Commission to ignore the natural business case that would result but for this proposed transaction. Verizon currently holds not only the B Block licenses it seeks permission to transfer to AT&T, but also 700 MHz *A Block* licenses. If Verizon did not sell this spectrum, but instead deployed mobile services on it (as stated in interim performance status reports[8] and keeping with the build-out requirements[9]

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6 *See* CCA Petition for Conditions at 1, 5-6, 10-12.

7 *Id*. at 5-6, 10-12.

8 *See, e.g.*, 700 MHz Interim Performance Status Report of Cellco Partnership for Call Sign WQJQ700 Market EA31 – Miami-Fort Lauderdale, Florida (filed Jan. 11, 2012).

9 *Service Rules for the 698-746, 747-762 and 777-792 MHz Band*, Second Report and Order, 22 FCC Rcd 15289 ¶ 157 (2007).

attached to the licenses), Verizon would surely rationalize this build-out to take advantage of both its A and B Block holdings. The practical effect would be an infusion of market demand for Band Class 12 devices. But for this transaction, Verizon would be forced to deploy on its A and B block spectrum, creating an ecosystem for interoperable devices.

The fact that there are separate rulemaking proceedings focused on interoperability and broader reform of the Commission's spectrum aggregation policies has no bearing on the Commission's authority to address the particular harms that would result from these transactions. The Commission routinely addresses transaction-specific harms in the context of evaluating applications pursuant to Section 310(d), including when broader rulemaking proceedings regarding related industry-wide issues are pending.[10] The Commission also has recognized that spectrum aggregation in particular often is a transaction-specific harm.[11] Here, competitive harms arise directly from AT&T's increase of its Lower 700 MHz B Block holdings through acquisition of the licenses at issue in this proceeding, and those threatened harms warrant a limited condition. Indeed, it would make no sense to give the Applicants a free pass to engage in

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10 *See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698, ¶¶ 120-121 (2012) ("*Verizon/SpectrumCo Order*") (imposing roaming condition to address transaction-specific harm, despite separate proceeding to address data roaming issues more broadly); *News Corp. and The DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶¶ 104-107 (2008) (imposing conditions relating to retransmission consent, including mandatory arbitration, notwithstanding pendency of ACA's petition for rulemaking to reform the retransmission consent rules); *SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, App. F (2005) (adopting specific Special Access commitments, among others, as "Conditions of [the Commission's] approval of the merger" of AT&T and SBC, despite a pending NPRM to reform special access rates).

11 *Verizon/SpectrumCo Order* ¶ 70.

targeted and specific harmful conduct merely because there are broader and more general public interest harms that warrant the Commission's attention.

The Commission therefore has the authority, and indeed the duty, to redress transaction-specific harms. And CCA's proposed condition is targeted to ameliorate that harm. The Commission should adopt CCA's proposal and require that any devices that operate on the Lower 700 MHz B Block licenses that are the subject of this transaction be capable of operating across the entire Lower 700 MHz band.

II. THE BROADER COMPETITIVE CONCERNS PRESENTED BY THESE TRANSACTIONS MAKE IT CRITICAL FOR THE COMMISSION TO RESOLVE ITS MOBILE SPECTRUM HOLDINGS PROCEEDING

Although CCA's request for conditions focuses on a narrow, transaction-specific harm, there can be no question that these proposed transactions implicate the broader competitive concerns that are afflicting the wireless marketplace. As CCA demonstrated in its opening petition, the dominance of AT&T and Verizon in the marketplace already has enabled them to gain control over the critical input of spectrum and has resulted in a lack of interoperability in the Lower 700 MHz band.[12]

These concerns were recently echoed by the Department in its *ex parte* submission in the mobile spectrum holdings proceeding. DOJ recognized that wireless "carriers do have the ability, and, in some cases, the incentive to exercise at least some degree of market power, particularly given that there is already significant nationwide concentration in the wireless industry."[13] DOJ noted that "spectrum is a key input for mobile wireless services," and that "the value of any particular block of spectrum also depends on the availability of networking

12 *See* CCA Petition for Conditions at 2-6.

13 DoJ Ex Parte at 8.

equipment and consumer devices that support the use of that spectrum."[14] DOJ raised the concern that "the more concentrated a wireless market is, the more likely a carrier will find it profitable to acquire spectrum with the aim of raising competitors' costs."[15] DOJ therefore urged the Commission to be attentive to "the potential that the acquisition of specific blocks of spectrum may have to foreclose or raise the costs of competitors . . . ."[16]

While the Commission should focus in this license-transfer proceeding on redressing the transaction-specific harm to device interoperability, it also should recognize that this transaction underscores the broader concerns about access to spectrum and its impact on competition that require additional reforms through the rulemaking process. As DISH notes, Verizon promised to divest its Lower 700 MHz A and B Block licenses to persuade the Commission that its transaction with SpectrumCo was sufficiently in the public interest.[17] Verizon's proposed divestiture was intended to promote the public interest by reducing anticompetitive spectrum aggregation. Of course, that objective will fail if valuable spectrum simply shifts from one duopolist to the other. As Public Knowledge recognizes, these transactions accordingly present a striking example of the shortcomings of the Commission's current approach to measuring and remediating spectrum aggregation.[18] Any spectrum screen that would allow the duopolists to

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14 *Id*. at 9, 13.

15 *Id.* at 10.

16 *Id*. at 11.

17 *See* Petition to Deny or Condition of DISH Network Corporation, WT Docket No. 13-56, at 3 (filed April 4, 2013); *see also* Letter from Adam D. Krinsky, Wilkinson Barker Knauer, LLP, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (May 2, 2012); Letter from Kathleen Grillo, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (May 22, 2012).

18 *See* Petition to Deny of Public Knowledge and the Writers Guild of America, West, WT Docket No. 13-56, at 2-3 (filed April 4, 2013).

expand their control of a critical input, subject only to the "remedy" that they divest portions of that input *to each other*, cannot protect the public interest.

It also is telling that Verizon proposes to sell only its B Block licenses, rather than including its A Block licenses. As set forth above, Verizon's decision to transfer its B Block licenses to AT&T and not build out its remaining A Block licenses further exacerbates the balkanization of the Lower 700 MHz band.

CCA has not asked the Commission to compel Verizon to participate in an alternative transaction, as the Applicants misleadingly suggest. Rather, the key takeaway is that, in addition to addressing the transaction-specific interoperability problem posed by AT&T's further aggregation of 700 MHz B Block spectrum, the Commission should accelerate action in its mobile spectrum holdings proceeding to create a more effective spectrum screen. As CCA has proposed and many others agree, the revised screen should appropriately weight spectrum holdings below 1 GHz to prevent band-specific aggregation, such as the spectrum licenses that are the subject of the transaction, and ensure that competitive carriers have a meaningful opportunity to acquire the critical inputs that they need to provide competition to AT&T and Verizon.

CONCLUSION

For the foregoing reasons, the Commission should condition any order approving the above-captioned transactions on an interoperability mandate that would require devices operating on the Lower 700 MHz B Block licenses that are the subject of the transaction to be capable of operating across the entire lower 700 MHz band. The Commission should also act quickly to resolve its parallel mobile spectrum holdings proceeding.

Respectfully submitted,

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